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Via email: achau@copyright.gov, jslo@copyright.gov

Regan Smith
General Counsel and Associate Register of Copyrights
Anna Chauvet
Associate General Counsel
Jason Sloan
Assistant General Counsel
U.S. Copyright Office
101 Independence Ave. SE
Washington, DC 20559-6000

RE: Docket No. 2020-05
Summary of *ex parte* discussion at June 21, 2020 meeting regarding
server fixation date and termination

Dear Ms. Smith, Ms. Chauvet, and Mr. Sloan:

As you know, I represent Songwriters of North America (“SONA”) in connection with various pending rulemakings under the Music Modernization Act (“MMA”). On June 22, 2020, SONA and other interested parties met remotely via Webex meeting (“June 22nd meeting”) with members of the Copyright Office to discuss a provision in a recent Notice of Proposed Rulemaking (“NPRM”). This letter (1) summarizes the *ex parte* discussion between the Copyright Office and interested parties during the June 22nd meeting, and (2) provides SONA’s responses to the two questions posed by the Office in its June 22nd email letter following up on the meeting.

The purpose of the June 22nd meeting was to discuss proposed regulatory language that would impact how the Music Licensing Collective (“MLC”) will administer the termination provisions of the Copyright Act.¹ In addition to representatives from the U.S. Copyright Office and SONA, the meeting was attended by representatives of the MLC, Digital Licensee Coordinator (“DLC”), Music Artists Coalition (“MAC”), Peermusic, Recording Academy, and the Songwriters Guild of America (“SGA”). A full list of representatives in attendance for each organization can be found in Appendix A of this letter.

¹ See 17 U.S.C. §§ 203 and 304(c).

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Ex Parte Discussion

In a recent NPRM issued by the Copyright Office reviewing the content of monthly usage reports to be submitted by digital music providers (“DMPs”) to the MLC, the Office referenced a proposal by the MLC to include “the date on which each sound recording is first reproduced by the DMP on its server,” or the server fixation date.² In previous comments to the Office, the MLC suggested the use of the server fixation date as a means of determining “which rights owner is to be paid where one or more grants pursuant to which musical work was reproduced in a sound recording has been terminated pursuant to Section 203 or 304 of the [Copyright] Act.”³ While the Office largely declined to adopt the proposal, the NPRM did not entirely reject it, leaving it open to further comments. In so doing the Office noted that no songwriter group had submitted comments addressing the proposal.⁴

In comments responding to this NPRM submitted jointly with MAC, SONA expressed concerns with the proposal to use server fixation dates as a “proxy” for licensing dates as a means of administering termination provisions under the Copyright Act.⁵ In their comments, SONA and MAC sought to ensure that any regulatory language relating to data collected by the MLC explicitly state that such a provision not be “interpreted in a manner that could diminish the termination rights of music creators.”⁶

During the June 22nd meeting, SONA representatives suggested that the proposed regulatory approach was unnecessary, underscoring their concerns with a work’s server fixation date being treated as a “license date,” which in some cases could negatively impact songwriter termination rights. SONA representatives indicated that the organization would be apprehensive of any rule treating a piece of data as a “proxy” for a grant under copyright law. SONA gave the example of a songwriter who may have reclaimed the rights to a song in the time between the song initially being fixed to a DMP server and the license availability date on January 1, 2021. Under the “proxy” approach, such a writer could lose royalty income they would otherwise be entitled to collect under the Copyright Act. SONA board member Dina LaPolt emphasized that songwriter groups were very interested in ensuring the rulemaking process did not have unintended consequences of impacting songwriters’ substantive rights under the Copyright Act. Representatives from MAC and the Recording Academy also expressed concerns with the rulemaking process having a substantive impact on the administration of termination rights.

² Music Modernization Act Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, 85 Fed. Reg. 22518, at 22532 (April 22, 2020).

³ *Id.* (quoting Comments of the Music Licensing Coordinator (“MLC”) in response to NOI Music Modernization Act Implementing Regulations for the Blanket License for Digital Uses and Mechanical Licensing Collective, Docket No. 2019-0002, at 19 (Dec. 20, 2019)).

⁴ 85 Fed. Reg. at 22532.

⁵ *See* Comments of Songwriters of North America (SONA) and Music Artists Coalition (MAC) in Response to NPRM Regarding MMA Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, Docket No. 2020-0005, at 3 (May 22, 2020).

⁶ *Id.* at 12.

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MLC representatives in the meeting acknowledged that it was not a function of the organization to enforce termination rights or otherwise resolve disputes between copyright owners over termination rights. The MLC also acknowledged that receiving server fixation or other data from the DMPs would not mean that the MLC would be taking a position on substantive law.

In response, SONA representatives underscored the distinction between utilization of a work and a license grant, which are not the same and should not be conflated in the regulations. SONA further noted that courts construing termination rights in future litigation proceedings could attribute significance to the collection of server copy or other data under Copyright Office rules. SONA also explained that termination rights are typically administered according to letters of direction submitted by the interested parties, and what needs to be determined is when a particular sound recording was first used by a particular service.

For their part, DLC representatives took the position that any such data could be burdensome to supply and suggested the MLC could administer termination rights based on records of use. Accordingly, the DLC suggested that usage reports could suffice for operational purposes.

As an alternative to server fixation date, the MLC proposed the use of “street date” to aid in the determination of which copyright owner should be paid royalties after a statutory termination. The street date is “the date on which the sound recording was first released on the DMP’s service by a record label or distributor.”⁷ MLC representatives stressed that server fixation and/or street date data should be provided to the MLC by a DMP in its monthly usage reports, rather than simply maintained by the DMP. Otherwise the MLC would have to request such information from each DMP every month.

The Copyright Office closed the meeting by indicating it would seek further input from the participants on potential regulatory language to clarify that the proposed data requirement for DMPs should not impact statutory termination rights, as well as the nature of the data to be supplied. The Office did so in a follow-up email. SONA responds to the two questions posed in the Office’s June 22nd email as follows:

1. Express regulatory clarification. To ensure the proposed data collection regulation is not interpreted in a manner that could affect music creators’ substantive termination rights, SONA suggests a somewhat modified version of the clarifying language that it had originally proposed in its joint submission with MAC, as follows:

“Neither the collection nor maintenance of records under paragraph (m)(2), nor the records themselves, shall be interpreted or construed to alter, limit, or diminish the ability of an author or any other person entitled to exercise rights of termination under section 203 or 304 of title 17 from fully exercising or benefiting from such rights.”

⁷ Comments of the Music Licensing Coordinator (“MLC”) in response to NPRM Regarding MMA Notices of License, Notices of Nonblanket Activity, Data Collection and Delivery Efforts, and Reports of Usage and Payment, Docket No. 2020-0005, at 32 (May 22, 2020).

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While its essence remains the same, SONA has modified its proposed language in response to suggestions from interested parties and to eliminate any potential doubt that the clarification applies to any party entitled to exercise termination rights under section 203 or 304.

2. Data to be collected and means of collection. Based on the discussion at the June 22nd meeting, it seems that both server fixation date and the “street date” specific to a particular DMP may be useful to establish initial utilization of a specific sound recording by a particular service. As discussed at the meeting, the initial utilization date can be critical to determine whether to pay the pre-termination or post-termination owner of a musical work. Although the DMPs’ monthly reports of usage may also be helpful in establishing initial use, given the intrinsic challenges of tracking and identifying tens of millions of sound recordings on myriad services and the possibility of erroneous or incomplete usage data, it seems an independent record of initial use could be a valuable means to verify such use should a question arise. Assuming the Copyright Office requires the collection and provision of server fixation and/or street date data, SONA concurs with the MLC that such data should be regularly transmitted to the MLC rather than requiring the MLC to request it.

Conclusion

SONA appreciates the Copyright Office’s continued diligence in seeking a transparent and workable MLC blanket license regime. SONA is thankful for the opportunity to participate in these discussions and remains available to provide further input if requested.

Sincerely,



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Appendix A: Meeting Attendees

U.S. Copyright Office

Regan Smith
Anna Chauvet
Jason Sloan

John Riley
Terry Hart
Cassandra Sciortino

MLC

Kris Ahrend
Richard Thompson
Ellen Truley
Alisa Coleman
Bart Herbison

Danielle Aguirre
Ben Semel
Frank Scibilia
Abel Sayago
Maurice Russel

DLC

Garrett Levin
Sy Damle
Sarah Rosenbaum

Music Artists Coalition

Susan Genco
Ned Waters

Peermusic

Timothy A. Cohan

Recording Academy

Todd Dupler

Songwriters Guild of America

Rick Carnes
Charles J. Sanders

Songwriters of North America

Lauren Hancock
Jacqueline Charlesworth
Dina LaPolt
Michele Lewis

Jack Kugell
Adam Gorgoni
Cameron Berkowitz